

9-4-98

MEMORANDUM FOR ALL DEPARTMENTAL ELEMENTS

FROM: THOMAS T. TAMURA
ACTING ASSISTANT SECRETARY FOR
HUMAN RESOURCES AND ADMINISTRATION

SUBJECT: DRAFT DOE O 137.1, PLAN FOR OPERATING IN THE
EVENT OF A LAPSE IN APPROPRIATIONS

The attached subject Order, developed by the Office of the Chief Financial Officer, was updated to reflect the opinion of the Legal Counsel of the Department of Justice regarding operating during a lapse in appropriations. The draft Order received approval by OMB, and as such, represents standing procedures for DOE. Comments are being solicited for a 30 day period beginning with the effective date of the Order.

The Order replaces DOE 5500.6B, SHUTDOWN OF DEPARTMENTAL OPERATIONS UPON FAILURE BY CONGRESS TO ENACT APPROPRIATIONS, of 5-18-92. Major changes from DOE 5500.6B, focus on the concept of imminent danger. The Legal Counsel of the Department of Justice opined that there must be a threat of imminent danger involving the safety of human life or the protection of property before essential activities are conducted during a lapse in appropriations. The proposed Order further recognizes that essential activities are dynamic subject to changing DOE missions.

Because DOE has an annual appropriation in FY 1998, Energy Supply, which expires for obligation purposes effective September 30, 1998, it is imperative that DOE organizations be familiar with procedures in this Order and prepared for a potential lapse in appropriations on October 1, 1998. Therefore, DOE O 137.1, PLANS FOR OPERATING IN THE EVENT OF A LAPSE IN APPROPRIATIONS, is hereby approved for simultaneous implementation and coordination.

Attachment

NOTE: THIS PAGE MUST BE KEPT WITH DOE O 137.1, PLAN FOR OPERATING IN THE EVENT OF A LAPSE IN APPROPRIATIONS

U.S. Department of Energy
Washington, D.C.

ORDER

DOE O 137.1

Approved: 9-4-98
Sunset Review: 9-4-01
Expires: 9-4-03

SUBJECT: PLAN FOR OPERATING IN THE EVENT OF A LAPSE IN APPROPRIATIONS

1. **OBJECTIVES.** To establish the Department's plan and procedures for—
 - a. continuing operations using balances from prior years, if available, during a lapse in appropriations; and
 - b. upon exhaustion of all available balances, continuing only those essential functions related to emergencies involving the safety of human life or the protection of property and initiating orderly shutdown of those activities not considered essential.

For background information concerning this Order, see Attachment 1.

2. **CANCELLATION.** DOE 5500.6B, SHUTDOWN OF DEPARTMENTAL OPERATIONS UPON FAILURE BY CONGRESS TO ENACT APPROPRIATIONS, of 5-18-92.
3. **APPLICABILITY.** This directive applies to all Departmental Elements.
4. **REQUIREMENTS.**
 - a. **Timing.**
 - (1) Initial fiscal year approved funding programs (AFPs) are issued prior to October 1 for guidance purposes only. However, if Congress has not passed appropriation legislation to finance the continuation of operations, AFP levels will be based upon the most conservative information available; that is, either the President's budget or the House or Senate appropriations committee marks—whichever of the three is lowest. If Congress fails to pass appropriations by October 1 for the new fiscal year, it is likely that a stopgap legislative measure, known as a continuing resolution (CR), will be enacted to provide limited, interim funding. In this situation, allotments will be issued in accordance with provisions of the CR.

Distribution:
All Departmental Elements

Initiated By:
Office of the Chief Financial Officer

- (2) A CR is legislation enacted to provide budget authority for specific ongoing activities for a specific period of time. The CR usually specifies a maximum rate at which the Department may incur obligations based upon the President's budget or the House or Senate appropriations committee marks, whichever forms the basis for the CR. The CR may state that obligations may not exceed the current rate or must be the lower of the amounts provided in the appropriations bills passed in the House or Senate.
 - (a) Prior to the beginning of the fiscal year, AFPs must be prepared based on the most conservative funding levels for the new fiscal year. These AFPs are issued, but the "Advice of Allotment" issued in conjunction with the AFP is restricted to the amount permitted under the terms of the continuing resolution. The funds provided by the allotment may be applied in any proportion throughout the AFP. However, the funds may not be used to—
 - 1 exceed any limitations or provisions specified in the terms of the continuing resolution or
 - 2 exceed any obligation control levels established in the AFP.
 - (b) The DOE Office of Budget will provide additional information pertaining to operating under a continuing resolution as necessary to ensure the orderly execution of program funds during this period.
- b. Operating in the Absence of New Appropriations. The Attorney General of the United States issued an opinion on 4-25-80 that the language and legislative history of the Anti-Deficiency Act unambiguously prohibits Federal officials from incurring obligations in the absence of appropriations. Essentially, in the absence of new appropriations, the Department may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. If there are no unobligated amounts from unexpired appropriations, the Department may incur, under authority of the Anti-Deficiency Act, obligations as necessary related to emergencies involving the safety of human life or the protection of property.
 - (1) If neither regular appropriations nor a CR is enacted, only funds currently obligated to the integrated contractors and the unobligated balances for unexpired appropriations will be available for initial fiscal year operations. Under this situation, each organization must carefully manage the funds available to ensure that only mandatory requirements are funded until an appropriation or CR is passed. Payroll and related fixed costs must be given the highest priority.

- (2) If a lapse in appropriations is likely to occur, the following actions will be taken:
- (a) In July, the Budget Execution Team will issue a call to allottees to obtain an estimate of the unobligated balances for all unexpired appropriations as of September 30.
 - (b) In September, the Budget Execution Team will request estimates of the mandatory obligational requirements chargeable to each appropriation for the month of October. These requirements should be provided in weekly increments, and categorized as either “Payroll and Related Obligations” or “All Other Mandatory Obligations”, as applicable. The “All Other” category must specify the nature of the requirement and items in this category should be prioritized. In a no-funds situation, funds will be allotted only where mandatory obligational requirements have been identified.
 - (c) In developing the estimate of mandatory obligational requirements, it is important that consideration be given to any funds previously obligated to the integrated contractors. In developing requirements, care must be taken to avoid duplicating any amount currently obligated for approved work scope.
 - (d) The Budget Execution Team will equitably distribute the unexpired, prior-year, unobligated balances among allottees within the same appropriation to meet minimum needs (e.g., salaries and benefits). Unobligated balances are not available for obligation until an Advice of Allotment, HQ F 2260.2, is issued for the new fiscal year.
- (3) Because the Department is funded from two public laws,¹ which in turn contain multiple appropriation accounts, a no-funds situation could occur for the activities funded by appropriations contained in one or both public laws. If one of the public laws is not enacted and no CR is passed, the Department would face a no-funds situation for selected activities. Under that situation, Headquarters Elements and Field Offices would be required to identify the affected programs, and the actions identified in Paragraph 4b(2) would apply to those activities only.

¹ The Energy and Water Development Appropriations Act and the Department of the Interior and Related Agencies Appropriations Act.

- (4) The potential for multiple no-funds situations also exists. If the regular appropriations are not passed, a CR usually provides for the continuation of operations; however, if the CR is of a short duration, the Department must prepare for a no-funds situation each time the CR expires. While a long-term (up to a year) CR may be passed, it is more likely that the CR will cover a period of less than 30 days, and often less than a week. Should this situation occur, guidance will be provided as each CR expires, and available budgetary resources will be distributed as law permits. Because of the potential for a no-funds situation occurring upon expiration of a CR, funds provided under a CR should be used before other available unobligated balances. This will preserve the unobligated balance of unexpired appropriations for operations in the event a no-funds situation does occur.
- c. Operating Under a No-funds Situation. If funds have expired and the funding lapse is anticipated to be temporary, the Department will perform certain essential activities. However, during a prolonged funding lapse, the Department may initiate obligations necessary for the orderly shutdown of operations.
 - (1) Essential activities to be continued during a no-funds and emergency situation include those performed by the Department that are authorized by law, and those involving the safety of human life or the protection of property. Some examples are—
 - (a) medical care for inpatients;
 - (b) protection of Federal lands, buildings, and equipment;
 - (c) law enforcement;
 - (d) emergency and disaster assistance;
 - (e) preservation of the money and banking systems;
 - (f) production of power and maintenance of the power distribution system;
and
 - (g) protection of research property.

The activities described in Attachment 2 are representative examples of essential activities currently performed by the Department, and should be used as a guide by Departmental Elements to identify essential activities that should be continued during a no-funds, emergency situation. However, the decision to continue such activities during a no-funds situation depends upon the specific circumstances at that time. It must be recognized that these activities have been identified on a generic basis; not every action within an essential activity is necessarily one that protects life or property. The Heads of Departmental Elements, in conjunction with the General Counsel and appropriate Secretarial Officers, will make the final determination of which functions are to be continued. Obligations incurred in connection with essential activities will be reviewed by the committee established pursuant to Paragraph 5c(4).

- (2) Essential activities shall be performed at the minimum level possible. The minimum number of staff and support services may also be maintained to perform each of these essential activities.

d. Effect of Appropriation Type on Shutdown.

- (1) All activities not approved as essential must begin an orderly shutdown when all funds available for obligation are exhausted (i.e., no funds). The actual timetable for shutdown will depend upon the type and amount of funding carried over and available to the organization, function, program, or activity.
- (2) In the case of annual funds, any unobligated balances will expire for purposes of incurring new obligations, and shutdown would commence immediately. However, Departmental Elements funded by no-year or unexpired multiyear appropriations shall continue to perform all activities at the minimum level possible until all available funding carried over from prior fiscal years has been exhausted. If Congress has not enacted an appropriation or continuing resolution at that time, those Departmental Elements shall commence shutdown activities. Each Departmental Element with funds available should exercise prudence in making new obligations.

e. Actions to Be Taken Prior to Initiating Shutdown Activities.

- (1) In the event of a funding lapse, carryover funds from prior fiscal years should be used to forestall, as long as possible, interruptions in activities funded by multi-year or no-year appropriations. Prior to the initiation of shutdown activities, all DOE operations should be limited to the minimum necessary activities to preserve the available funds and to continue all possible operations and functions. The Chief Financial Officer will reallocate available funds to the extent permitted by law to forestall the interruption of funding. Reallocation of funds will be made as follows:
 - (a) The Office of Budget may reallocate funds below the appropriation and fund account level through telephonic revisions to allotments. Such changes must be documented and immediately reflected in formal written revisions to DOE F 2260.2, "Advice of Allotment," as provided in the DOE Accounting Handbook.
 - (b) If DOE has specific statutory authority to reallocate and transfer funds between appropriations and/or fund accounts, the transfers will be effected in accordance with the standard fiscal procedures governing appropriation transfer of DOE funds. Such transfers generally will be effected on Standard Form (SF) 1151, "Nonexpenditure Transfer of Funds."

- (c) As provided in OMB Bulletin 80-14, amounts contained in OMB apportionments may be adjusted without submission of a reapportionment request.
 - (d) After all available funds have been reallocated or transferred and the available resources finally exhausted, the organizations, functions, programs, or activities funded through the now-depleted appropriations must begin the orderly shutdown of all activities not identified as essential.
 - (e) The Department may incur obligations for essential and shutdown activities once available funds have been exhausted; however, no funds will be disbursed for these obligations without the enactment of an appropriations act or continuing resolution.
- (2) If funds are available for continuing certain programs, staff time should be used efficiently to carry out those operations. Thus, plans may be prepared to detail all possible personnel to organizations that have available funds. An implementation plan should be developed before the shutdown is initiated to assign these personnel to specific, funded functions and work tasks. These personnel resources should be transferred only to eliminate backlogs or accelerate accomplishments in those funded program areas.
 - (3) To optimize use of DOE resources, program managers must compare programmatic priorities with pending and ongoing contractual and assistance activities as soon as possible to determine which activities to continue or cancel. He or she should deobligate funds from lower priority activities where feasible.
 - (4) The review committee established pursuant to Paragraph 5c(4) should develop operational procedures for the required review of obligating documents.
- f. Instructions For Shutdown of Nonessential Activities. No actions under this contingency plan are to be initiated without written notification from the Secretary that the plan is to be put into effect.
- (1) Immediate Shutdown (Days 1 and 2).
 - (a) Only personnel designated as emergency personnel report to work during Departmental shutdowns.
 - 1 Emergency employees perform duties vital to the continuity of activities described in Paragraph 4c(1), and are required to be at work regardless of emergency situations or any general dismissal authorization. These employees will not be furloughed under the provisions of this Order and will not be dismissed or excused from work due to emergency situations described in OMB Memorandum,

“Shutdown of Agency Operations Upon Failure by the Congress to Enact Appropriations,” of 8-28-80 (and amended by OMB Memorandum, “Agency Operations in the Absence of Appropriations” of 11-17-81 and further updated by Department of Justice memorandum, “Government Operations in the Event of a Lapse in Appropriations” of 8-16-95).

- 2 Emergency personnel shall be identified by job title; each essential employee must be notified of his or her obligations.
 - 3 Heads of Departmental Elements must submit a list of emergency employees by name and job title to the Assistant Secretary for Human Resources and Administration for approval prior to October 1 if a no funds situation appears likely.
- (b) If a funding lapse is likely to occur, the Assistant Secretary for Human Resources and Administration shall authorize the Deputy Assistant Secretary for Human Resources to transmit a sample “Furlough Decision Notice Due to Lapse of Appropriations” (5 CFR Part 752) to appropriate servicing personnel offices. Issuance of this notice prior to furlough is preferable but when this is not feasible, any reasonable notice (telephonic or oral) is permissible. If prior written notice is not provided, the Department must provide the employee with a written decision notice at the earliest possible time following the furlough.
 - (c) The affected servicing personnel office(s) shall prepare a specific furlough notice for each organization affected and shall transmit the letter to the point of contact designated under Paragraph 5c(3).
 - (d) The point of contact shall distribute copies of the specific furlough notice to each employee not designated essential. Employees must acknowledge receipt of the notice in writing; to do this, employees may sign a list indicating they have received the notice. The final list of all employees to whom notices have been issued will be submitted to the servicing personnel office so that the appropriate personnel actions may be effected.
 - (e) To facilitate the issuance of furlough notices, the Chief Financial Officer shall notify the Assistant Secretary for Human Resources and Administration, when funds for specific organizations or functions remain for approximately 2 workdays only.
 - (f) Members of the Senior Executive Service will be furloughed in accordance with DOE 3350.1.
 - (g) Presidential appointees who are outside the SES and are not otherwise subject to 5 U.S.C. 6301 and attendant regulations governing leave in the Federal service are not subject to furlough.

- (h) The specific authority for furloughing individuals working under mobility agreements pursuant to the Intergovernmental Personnel Act, in organizations either inside or outside the Federal government, will depend upon the nature of individual agreements, the status of the appointments, and/or the funding arrangements for the assignments. As a general rule, the following principles apply in determining whether to furlough personnel on Intergovernmental Personnel Act mobility assignments:
 - 1 Individuals from non-Federal organizations on appointments to the Department are subject to furlough in the same manner as other employees.
 - 2 Individuals on detail to Federal agencies from non-Federal organizations may continue working, provided the non-Federal organizations pay the total costs of the detail.
 - 3 Personnel on detail to Federal agencies from non-Federal organizations that share the costs of the detail may continue to work if the Federal portion of the cost was obligated from prior appropriations at the time of the Intergovernmental Personnel Act mobility agreements. If a furlough takes place in the second year of the agreement and no funds are appropriated at that time, the assignment should be terminated.
 - 4 Personnel on detail to Federal agencies from non-Federal organizations that do not pay or share the costs of the detail are subject to furlough in the same manner as other employees.
- (i) Temporary employees must be furloughed in the same manner as permanent employees.
- (j) An employee on official travel will not be furloughed until either the period of travel ends or the provisions for a longer lapse in appropriations are implemented, unless the Head of the Departmental Element or designee determines that the cost of terminating the travel, returning the employee to his or her official duty station, and resuming the travel later, if necessary, is less than retaining the employee in a pay status.
- (2) Day 3. Extended shutdown procedures begin if Departmental Elements receive written notification from the Secretary that neither a continuing resolution nor an appropriation is forthcoming.
 - (a) Employees required to complete shutdown activities and those additional employees required to maintain essential activities during the shutdown period will be recalled. The status of emergency employees will be identified as “nonpay duty.” Such employees are advised that the United States will not contest its legal obligation to pay for their services, even in an absence of appropriations.

- (b) Supervisors will inform employees (orally or in writing) that the only activities they may perform are those identified as essential activities or part of operation shutdown.
- (c) Supervisors shall contact any employee on travel status and advise him or her to return to the duty station immediately, unless the employee volunteers to be furloughed at the travel site and such arrangement is in the best interest of the Federal Government. Travelers should return in accordance with normal Federal Travel Regulations.
- (d) The Day 3 activities of an orderly shutdown of operations include, but are not limited to the following:
 - 1 Canceling meetings, hearings, and other previously arranged business and notifying parties such as other Federal agencies, State governments, and private entities involved in Departmental matters of the cessation of normal business.
 - 2 Documenting the status of cases and projects so they can be resumed, transferred, or otherwise appropriately handled when the funding situation is determined.
 - 3 Taking steps to plan, control, and maintain orderliness throughout the phasedown of operations.
 - 4 Performing the fiscal and accounting tasks required to maintain accountability and reporting obligations and expenditures of all funds.
 - 5 Preparing files for permanent storage and preparing for the orderly transfer of property and records as directed by GSA and OPM. However, property and records are not to be transferred until 30 days after shutdown activities have commenced, and then only after determination that the funding interruption will be substantial or indefinite.
 - 6 Preparing inventories of property and records to ensure protection of the Government's interests and the claims of affected private entities and individuals.
 - 7 Performing those tasks necessary to protect classified information, including listing all papers to be accorded classified status and securing all appropriate files and automatic data processing information.
 - 8 Performing requisite administrative functions, such as processing the payroll for the pay period through 9-30 of the previous fiscal year or the expiration of the previous continuing resolution, and continuing those functions with carryover funds until funds are exhausted.

9 Conducting other functions that contribute directly to the orderly shutdown of the Department and aim primarily to protect life and safeguard Government property and records.

(e) Supervisors should continue to identify those employees or positions that are necessary to perform the functions associated with the orderly cessation of activity. These employees will continue to work for the length of time necessary to complete shutdown activities. The selection of employees to participate in shutdown activities should be based on—

1 the number of employees or positions necessary for the orderly termination of an activity; and

2 the special knowledge, skills, or abilities required to terminate activities.

(3) Day 4.

(a) Employees shall continue those activities identified in Paragraph 4f(2)(d).

(b) The Assistant Secretary for Human Resources and Administration shall communicate final determinations on all shutdown or essential activities to the Director of Personnel.

(c) The Director of Personnel shall communicate any changes in the lists submitted to the servicing personnel offices.

(4) Day 5 and Beyond.

(a) Employees shall continue those activities identified in Paragraph 4f(2)(d).

(b) As employees required to perform shutdown activities complete their assigned work, they will be placed in a furlough status. Each employee's supervisor is responsible for promptly notifying the servicing personnel office through the organizational point of contact when an employee is placed on furlough so the proper documentation can be placed in the employee's official personnel folder.

(c) Each servicing personnel office is responsible for processing the required personnel actions.

(5) All shutdown activities should be accomplished to facilitate efficient reactivation of operations when funds are again available.

g. Prohibited Activities.

(1) Unless they are essential to the direct support of essential authorized activities, the following will not be permitted after available funds are exhausted:

- (a) awards of grants, contracts, cooperative agreements, scholarships, and small purchases;
 - (b) hiring of personnel or extending the appointment of personnel whose appointments have expired if doing so would result in unauthorized obligation of funds during a lapse of appropriations;
 - (c) travel of persons and transportation of things; persons in travel status on the first day of a no funds situation will return to their duty stations as soon as possible, except as provided in Paragraph 4f(1)(j);
 - (d) meetings, conferences, and seminars;
 - (e) new or continued employment of experts and consultants if such actions will incur a financial obligation;
 - (f) training classes and other training activities;
 - (g) use of equipment and utilities not related to authorized activities where their use creates liabilities for the Government beyond those existing on the date of the funding lapse; and
 - (h) authorization of overtime.
- (2) This listing should not be considered exhaustive. Actions taken should be consistent with the Attorney General's opinion (see letters of 4-25-80 and 1-16-81) and subsequent OMB guidance. Questions of interpretation should be referred to the General Counsel.

5. RESPONSIBILITIES.

a. Secretary.

- (1) Notifies OMB, the Office of Personnel Management (OPM), the Department of the Treasury, and the General Services Administration (GSA) immediately upon initiation of shutdown activities.
- (2) Notifies DOE Elements to begin orderly shutdown of operations not identified as essential when funding is depleted.
- (3) Notifies all personnel of possible fund interruptions and furlough actions.
- (4) Designates one organization to coordinate activities associated with the shutdown plan.

- b. Secretary or Deputy Secretary. As Chairman of the Executive Personnel Board, reviews recommendations on SES employee positions, including positions identified as necessary to maintain and continue essential activities and those needed to perform shutdown activities, and makes the final determination on the furlough of SES appointees in accordance with the provisions of DOE 3350.1.
- c. Heads of Departmental Elements.
 - (1) Review annually the list of essential activities to determine whether any activities should be deleted or new functions added; submit this information to HR-1 as required.
 - (2) Identify those employees necessary to maintain and continue essential activities and those needed to perform shutdown activities; submit this information to HR-1 as required.
 - (3) Designate single individuals within their respective organizations to serve as points of contact for instructions pertaining to overall implementation of the shutdown plan and subsequent reactivation of Departmental operations.
 - (4) Prior to initiation of a shutdown mode of operations, appoint representatives from their respective organizations to act as a review committee. The review committee shall concur in all funding actions program managers deem to be essential in the absence of needed appropriations during a fiscal year. The review committee must have one member from the appropriate general counsel's office and one member from the organization's financial management group. At Headquarters, the financial management representative shall be a member of the Chief Financial Officer's staff. The signature of each reviewer must be affixed to every program release document or obligation document initiated during the funding hiatus.
 - (5) Notify appropriate bargaining agents of any proposed shutdown due to a lack of funds as soon as feasible after the decision has been made and prior to delivery of furlough notices to employees.
 - (6) Negotiate the impact and implementation of the shutdown of operations in accordance with DOE policy and the Federal Labor Management Relations Statute (5 U.S.C., Chapter 71), if requested to do so by a properly recognized bargaining agent. The decision to shut down operations due to a lack of funds is not negotiable; therefore, negotiations shall not preempt that decision.

- d. General Counsel. Assists the Secretary and Heads of Departmental Elements in identifying the essential functions performed by the Department, and in identifying the associated emergency personnel required to perform these functions to ensure compliance with OMB guidance and opinions of the Attorney General.
- e. Chief Financial Officer. Notifies the Secretary when funds for specific functions or organizations are depleted and shutdown procedures are to be implemented. The Chief Financial Officer shall, upon direction from the Secretary–
 - (1) establish special accounts in the financial information system (FIS) to accumulate all obligations incurred in maintaining essential activities and terminating Departmental operations as funds are depleted;
 - (2) redistribute unobligated, unexpired funds to meet urgent requirements and to delay, to the extent possible, the shutdown of functions and organizations; and
 - (3) notify the Assistant Secretary for Human Resources and Administration, through the Director of Personnel, when funds for specific organizations or functions remain for only 2 workdays.
- f. Assistant Secretary for Human Resources and Administration. Through the Director of Personnel and upon direction from the Secretary–
 - (1) obtains and reviews lists of essential activities and related emergency personnel from Heads of Departmental Elements, as required;
 - (2) delegates to servicing personnel offices authority to issue furlough notices to the field elements;
 - (3) prepares examples of furlough notices consistent with OPM and DOE regulations and policies, and transmits the examples to the appropriate servicing personnel office(s);
 - (4) notifies employees of their rights and benefits while they are in furlough status;
 - (5) takes necessary actions to transfer custody of the Department's personnel records to OPM and GSA.
- g. Heads of Contracting Activities.
 - (1) Suspend acquisition and assistance awards pending validation of program award decisions.

- (2) Facilitate the deobligation of funds for unexpired appropriation accounts through contract modifications to maximize funds availability for essential activities.
 - (3) Modify contracts in accordance with program determinations.
- h. Program Managers at Headquarters and Field Elements. Those program managers who initiate program release documents that establish a commitment or an obligation of funds, such as travel orders, payrolls, purchase orders, or procurement requests, shall take the following actions:
 - (1) Review all pending and active program release or obligation documents to determine whether the action should be continued or canceled.
 - (2) Submit each program release document or obligation document to the appropriate review committee established during a funding hiatus, pursuant to Paragraph 5c(4). The committee will review the action to determine whether the request appears to be for an essential function.
 - (3) Certify on each program release document that the commitment or obligation of funds is essential in accordance with the functions permitted during a period of funding hiatus.
- i. Servicing Personnel Office(s). Prepare a specific furlough notice for each organization affected and transmit the letter to the point of contact designated under Paragraph 5c(3).

6. REFERENCES.

- a. Title 31 United States Code, Sections 1341 and 1342, which state that–
 - (1) no Federal officer or employee may authorize Government obligations or expenditures in advance of or in excess of an appropriation, unless otherwise authorized by law, and
 - (2) no Federal officer or employee may accept voluntary services except as authorized by law.
- b. DOE 3350.1, FURLOUGH IN THE SENIOR EXECUTIVE SERVICE, of 9-13-82, which establishes Departmental procedures for furlough of Senior Executive Service (SES) employees.

- c. DOE O 135.1, BUDGET EXECUTION - FUNDS DISTRIBUTION AND CONTROL, of 9-30-95, which sets forth DOE requirements and responsibilities for the distribution and control of all obligational authority available to DOE for conducting operations.
- d. DOE M 135.1-1, BUDGET EXECUTION MANUAL, of 9-30-95, which provides detailed procedures for distributing and controlling DOE funds, and establishes the procedures for reprogramming, restructuring, and initiating appropriation transfer actions for DOE.
- e. DOE Accounting Handbook, of 9-30-95, which presents DOE standards, procedures, and operational requirements in support of DOE accounting policies, principles, and legal requirements.
- f. General Accounting Office Report, "Funding Gaps Jeopardize Federal Government Operations," of 3-3-81, which addresses the problems created by late appropriations and fund interruptions; describes the factors that delay the enactment of legislation; and recommends action to prevent funding delays in the future.
- g. Office of Management and Budget (OMB) Bulletin 80-14, as amended 8-20-82, "Shutdown of Agency Operations Upon Failure by Congress to Enact Appropriations," which provides policy guidance and instructions for actions to be taken when Congress fails to enact appropriations.
- h. OMB Memorandum, "Agency Operations in the Absence of Appropriations," of 9-30-80, which states that in the absence of new appropriations, agencies may continue only those activities otherwise authorized by law, and those necessary to begin phasing down other activities.
- i. Opinion of the Attorney General, in a letter from Benjamin R. Civiletti to the President, of 4-25-80, which states that upon a lapse of appropriations, Federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. It further states that the Department of Justice would enforce the criminal provisions of the Anti-Deficiency Act in the case of future willful violations.
- j. Opinion of the Attorney General, in a letter from Benjamin R. Civiletti to the President, of 1-16-81, which provides the basis for OMB's guidance of 9-30-80 on agency operations during a lapse of appropriations and presents additional questions of interpretation.

- k. Opinion of the Assistant Attorney General, Walter Dellinger, in a letter to Alice M. Rivlin, Director, Office of Management and Budget, of August 16, 1995, which clarified that only those functions considered emergencies involving the safety of human life or the protection of property would continue upon exhaustion of available funding.
7. CONTACT. For additional information, contact CR-13, (301) 903-2818.

BY ORDER OF THE SECRETARY OF ENERGY:



Thomas T. Tamura
Acting Assistant Secretary for
Human Resources and Administration

BACKGROUND INFORMATION
OPERATING IN THE EVENT OF A LAPSE IN APPROPRIATIONS

1. The Attorney General issued an opinion on 4-25-80 concerning the effect of the Anti-Deficiency Act upon a Federal agency that experiences a prolonged lapse in its appropriations from Congress once its current appropriations have expired. The Attorney General determined that an agency may not incur any obligation that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. The Department of Justice shall actively enforce the criminal provisions of the Anti-Deficiency Act. However, the Attorney General determined that an agency may incur limited obligations during a prolonged lapse in funding if those obligations are necessary for the orderly termination of the agency's activities.
2. The Office of Management and Budget subsequently provided policy guidance and instructions for executive branch agencies to follow when Congress fails to enact regular appropriations, a continuing resolution, or a needed supplemental appropriation, thereby interrupting fund availability. Each agency is required to develop a contingency plan for the orderly shutdown of operations. The OMB memorandum of 8-20-82 included examples of essential activities that could be continued during these funding gaps because they involve the safety of human life and the protection of property.
3. On 1-16-81, the Attorney General issued a second opinion on the effect of the Anti-Deficiency Act during funding gaps, which incorporated OMB policy guidance. In this opinion, the Attorney General explained how the Anti-Deficiency Act would affect an agency whose funds expire during a temporary funding lapse (i.e., no prolonged lapse in agency appropriations is anticipated). The Attorney General opined that if the funding lapse is anticipated to be temporary, an agency whose appropriations have expired could incur obligations only for activities related to the safety of human life or the protection of property. The categories of essential activities contained in the OMB memorandum were expressly approved by the Attorney General. No approval was given for obligations involving orderly termination activities during a temporary funding lapse.
4. On 8-16-95, the Assistant Attorney General issued an opinion clarifying the 1981 opinion on the interpretation of essential activities related to emergencies involving the safety of human life or the protection of property.

ESSENTIAL ACTIVITIES

The essential activities listed below are representative examples of activities that may be necessary for DOE to fulfill its responsibility for the safety of human life and protection of property under threat of imminent danger during a no-funds and emergency situation. Clearly, emergencies involving the safety or property protection do not include ongoing, regular government functions that, if suspended, would not pose an imminent threat of danger. Accordingly, essential activities should include only those tasks that, if not carried out, would pose a threat to the safety of human life and protection of property. Consistent with this perspective, Departmental Elements should identify specific essential activities and retain as emergency personnel only those employees necessary to perform these activities under threat of imminent danger.

The following list of essential activities may be consulted to determine the list of essential activities for a DOE Element:

- a. command and control activities of the Department;
- b. safe transportation of personnel or hazardous materials;
- c. law enforcement activities concerned with protection and/or surveillance;
- d. disaster and emergency services and necessary maintenance operations related to critical or research activities;
- e. health and safety related activities;
- f. production and distribution of power for essential operations;
- g. national security affairs;
- h. protection of Federal lands and properties; and
- i. administrative services, such as financial and personnel activities necessary to support emergency personnel engaged in tasks related to the safety of human life or protection of property.